Filed 12/8/16 In re M.L. CA1/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re M.L., a Person Coming Under the Juvenile Court Law.	
SAN FRANCISCO COUNTY FAMILY & CHILDREN'S SERVICES, Plaintiff and Respondent, v. M.L. et al., Defendants and Appellants.	A147356 (San Francisco County Super. Ct. No. JD14-3242)

This is an appeal from a juvenile court order in dependency proceedings involving two-year-old minor, M.L., denying petitions filed by parents/appellants, M.L. (father) and S.L. (mother), seeking modification of prior court orders relating to custody and reunification services. Parents also seek reversal of the juvenile court's order terminating their parental rights based upon the purported failure of the court and the San Francisco County Family & Children's Services Agency (agency) to fully comply with the notice requirements of the Indian Child Welfare Act of 1978, 25 U.S.C. section 1901 et seq. (ICWA). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts were, to a large extent, set forth in an earlier opinion in this cause, and will not be repeated at length here. (*M.L. v. Superior Court* (*San Francisco Human Services Agency*), A145269, November 10, 2015, nonpub. op.) In this earlier

opinion, we denied parents' petitions for writ of review of the juvenile court's order terminating their parental rights and setting the matter for hearing pursuant to Welfare and Institutions Code section 366.26 to implement a permanent plan for minor.[1] In doing so, we concluded that "the record supports the juvenile court's findings that returning the child would create a substantial probability of detriment to the child and that it was not substantially probable that the minor would be returned to parents before the date for the 12-month hearing due to parents' failure to make sufficient progress in their case plans." Accordingly, in the name of judicial economy, we begin here where our earlier opinion ends.

On August 27, 2015, while the writ proceedings were still pending, the agency filed a section 366.26 permanency planning report. In this report, the agency recommended that minor's caregiver (M.B.) be appointed legal guardian of minor's older siblings, and that parental rights as to minor be terminated in order to free her for adoption by M.B. The report added that all four children were thriving in the caregiver's home, and were both physically healthy and developmentally on target. Minor, who had been with the caregiver since she was less than one year old, considered her the primary attachment figure. The caregiver, in turn, had expressed a desire to adopt minor.

The report further noted that parents continued to have supervised visits with minor and her siblings after their services terminated. These visits generally went well, although both father and mother had, at different times, been redirected (father, for failing to pay appropriate attention to the children and, mother, for grabbing a handful of candies for them).

An addendum report was then filed on October 30, 2015, which noted, among other things, that an October 8 visit had gone fairly well; however, the social worker was concerned that parents were not appropriately engaging with or monitoring the behavior of the older siblings. Towards minor, on the other hand, parents appeared loving and

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[1] Unless otherwise stated, all statutory citations herein are to the Welfare and Institutions Code.

attentive. The report also indicated that parents had resumed couples counseling and had provided documents to show their participation in other services despite court termination of their reunification services. In addition, mother was receiving monthly injections to stabilize her mental health, and both parents were visiting with the children. The report noted concern, however, that parents continued to maintain that they did not understand why minor had been removed, and appeared hostile toward the agency, making it difficult to engage and help them.

On November 9, 2015, the caregiver filed a de facto parent request for minor. This request was granted by the court on November 24, 2015.

In late November/early December 2015, parents filed separate petitions for modification of the prior juvenile court's orders continuing minor's out-of-home placement and terminating their reunification services.[2] In these petitions, parents contended that minor should either be returned to their custody or that further reunification services should be provided in light of their substantial progress in eliminating the concerns that had prompted minor's removal. Among other things, father asserted that he had been undergoing individual therapy and couples counseling, had become gainfully employed and found stable housing, had gotten control of his "former alcohol abuse," and acquired better parenting and marital skills.

Mother, in turn, asserted that she had been regularly taking monthly injections that had enabled her to successfully address her mental illness, and, like father, had been undergoing individual therapy and couples counseling (which, according to her therapist, had been significantly beneficial), found stable housing, and taken classes to improve her parenting and anger management skills. Both petitions were supported by a letter from the parent's therapist.

A hearing on these petitions was held on January 13 and 14, 2016, at which several witnesses testified, including mother, father, couples' counselor, Tasmin

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[2] We treat the modification petitions filed by parents, who have joined in each other's appellate briefs, collectively for purposes of our review.

Goldsmith, and social workers Jaemie Cadiente and Van Luong. In particular, both social workers recommended the court deny parents' petitions, expressing concerns based upon their individual observations during supervised visitation regarding mother's and father's present ability to adequately care for minor and her siblings. In addition, both social workers noted the strong bond minor had developed with her caregiver, whom she considered her primary attachment figure. Parents and their couples' counselor, Tamsin Goldsmith, in turn, testified to the progress they had made in the areas of parenting, emotional control, mental health, substance abuse, and domestic stability. Goldsmith acknowledged, however, that she had never observed parents with their children and had no way of evaluating their parenting skills, which was not the focus or goal of their therapy with her.

Following this hearing, the court denied parents' petitions, finding that neither parent had met his or her burden of demonstrating that it would be in minor's best interest to be returned home or for mother or father to receive further reunification services. Timely appeal by both parents followed.

DISCUSSION

Parents raise the following issues for our review. They contend the juvenile court erred, first, in denying their separate petitions for modification of prior court orders relating to minor's placement and termination of reunification services (§ 388) and, second, in failing to ensure full compliance with the mandatory notice provisions of ICWA (§ 224.2). The governing law, set forth below, is generally not in dispute.

I. Denial of Parents' Petitions for Modification (§ 388).

Before and after reunification services are terminated, a parent has a continuing right to petition the court pursuant to section 388 for a modification of any order in the case based on a showing of changed circumstances or new evidence. (§ 388.) In bringing the petition, the parent has the burden to prove by a preponderance of the evidence that changed circumstances exist and that the proposed modification would be

in the child's best interest. (*Nahid H. v. Superior Court* (1997) 53 Cal.App.4th 1051, 1068; Cal. Rules of Court, rule 5.570(a)(e).)

A juvenile court's decision to grant or deny a section 388 petition will not be disturbed on appeal absent a clear abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) In applying this standard, we keep in mind that "[s]ection 388 plays a critical role in the dependency scheme. Even after family reunification services are terminated and the focus has shifted from returning the child to his parent's custody, section 388 serves as an 'escape mechanism' to ensure that new evidence may be considered before the actual, final termination of parental rights. [Citation.] It 'provides a means for the court to address a legitimate change of circumstances' and affords a parent her final opportunity to reinstate reunification services before the issue of custody is finally resolved. [Citation.]" (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1506; see also *In re Marilyn H.* (1993) 5 Cal.4th 295, 307 [section 388 is one of the "significant safeguards" built into the dependency scheme to ensure parents receive due process].)

Here, parents contend the juvenile court's denial of their section 388 petitions was an abuse of discretion because, as a matter of law, parents proved their circumstances had changed such that further reunification services, if not minor's return to their care, were in minor's best interests. According to these petitions, since reunification services had terminated, father had on his own initiative found a stable job and place to live, refrained from abusing alcohol, and participated in and/or completed a parenting class, individual therapy and couples counseling with mother. Moreover, Goldsmith, parents' couples counselor, testified at the hearing to the progress they had made during their therapy, and to the fact that she had observed less bickering in recent months and was aware of no acts of domestic violence. Mother, like father, had also found a stable part-time job and was compliant with her (former) case plan. In addition, the petitions included a letter from mother's therapist, who reported that mother had, for the past year, successfully treated her mental illness with monthly injections, had significantly reduced her anger outbursts and stabilized her moods, and was regularly participating in individual therapy in addition to couples counseling. And both parents had regularly and consistently visited

with minor (twice monthly), which, according to parents was positive and loving for the entire family. Among other things, during these visits, parents appropriately engaged minor in games and were attentive to her needs. According to father, minor was very bonded to him and called him, "Daddy."

However, even accepting this evidentiary showing by parents of their progress in several realms of their lives, including their mental health and domestic well-being, as reflected in the agency's opposition to their petitions, several areas of concern remained. For example, father's ability to remain sober and to provide adequate care for minor remained uncertain. While father appeared to be drinking less, he had failed to demonstrate a sustained effort to address his history of alcohol abuse through treatment such as Alcoholics Anonymous (where his participation had been spotty at best). Further, while mother had appeared to gain control over her mental health through monthly injections and therapy, she nonetheless appeared to have trouble handling minor and her siblings when father was not present. In fact, several times both she and father needed to be prompted or redirected by staff during visitation. And, with respect to both parents, it is undisputed that there remain significant lingering questions regarding their ability to parent, particularly a young child like minor, who had by this point been living with her caregiver since she was just one year old. For example, the social worker testified that parents often appeared to lack any sort of plan or structure when interacting with minor and her siblings during visits, with the result that staff would need to assist them. Further, parents had never sought less restrictive or more frequent visitation with minor. As the social worker pointed out, despite the length of time that had passed since minor's removal, parents had still failed to progress to unsupervised visits — a fact we also noted over a year ago in our November 10, 2015 decision to deny their writ petitions.

Meanwhile, minor, now over two years-old, had by all accounts become quite attached to her caregiver, calling her "Mom." The caregiver undisputedly provided excellent care for minor and her older siblings, and had expressed a firm desire to adopt minor and become legal guardian to the siblings. For these reasons, the social workers involved in this case opined that minor's primary needs had become permanency and

stability rather than reunification with parents. In the end, they had concluded that, while parents' parenting abilities had improved significantly in the past few months, it was still not safe to return minor to their care.

In agreeing with the agency's recommendations to deny parents' section 388 petitions and to proceed with minor's adoption by her caregiver (with continuing visits with parents), the juvenile court acknowledged mother and father had progressed in several regards. Nonetheless, the court ultimately found parents had not met their burden of proving that it would be in minor's best interest to return home or to order further reunification services because, while their circumstances were improving, they were not necessarily "changed," as section 388 requires. (*In re S.R.* (2009) 173 Cal.App.4th 864, 870 ["Not every change in circumstances can justify modification of a prior order. The change in circumstances must relate to the purpose of the order and be such that the modification of the prior order is appropriate"].) In particular, the juvenile court noted concern, reflected in the social workers' testimony (described above), that parents had not yet developed the parenting skills sufficient to provide for a young child like minor.

Thus, after weighing the stability of minor's current placement against the risks associated with returning her to parents' care or ordering further services, the juvenile court concluded parents had not met their burden of proving the proposed modifications were in minor's best interest. While parents may disagree with this conclusion, the record clearly reflects that the court, before denying their petitions, considered a multitude of appropriate factors, including their efforts to address the underlying problems leading to minor's removal, as well as minor's needs at this post-reunification juncture for permanency and stability. Thus, because the court properly exercised its discretion and because its findings are amply supported by the evidentiary record, no grounds exist for reversal.[3] (*In re Stephanie M., supra,* 7 Cal.4th at pp. 317-318; see also

[3] As the agency points out, parents produced little, if any, evidence demonstrating that minor's primary interests in stability and permanency would be furthered by the modifications they propose, even though it was their burden to do so. (*In re Stephanie M., supra,* 7 Cal.4th at pp. 317-318.) Parents, in response, insist the juvenile court (and

In re Angel B. (2002) 97 Cal.App.4th 454, 465 ["stability in an existing placement is in the best interest of the child, particularly when such placement is leading to adoption by the long-term caretakers"].) We therefore affirm the lower court's judgment.

II. Compliance with the ICWA Notice Provisions (§ 224.2).

The remaining issue for our review relates to the notice requirements under ICWA.[4] According to parents, the notice sent by the agency to the Indian tribes was inadequate because it lacked sufficient identifying information with respect to both maternal and paternal linear relatives, requiring reversal of the order terminating their parental rights. (See 25 U.S.C., § 1914 [ICWA renders voidable any action taken without requisite notice to the tribe or Bureau].) For example, the ICWA-030 notice prepared by the social worker included only the name, date of birth, and tribal affiliation (to wit, Bureaus of Indian Affairs) for the maternal grandmother, and the names, dates of birth

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the agency) erred by focusing exclusively on minor's need for permanency and stability, while wholly disregarding other relevant factors. The record, described above, belies this claim. There was a wealth of evidence before the juvenile court regarding such relevant factors as the seriousness of the problems that triggered minor's removal (including father's alcohol abuse), whether such problems had been removed or ameliorated, and the relative bonds between minor and parents and minor and the caregiver. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.) Moreover, it is clear from the hearing transcript that the court considered these factors before ruling. For example, the court noted father's "somewhat spotty" participation in therapy and failure to concentrate on treatment for alcohol abuse after his release from prison. The court also described mother's progress as significant, but not "sufficient . . . at this stage to warrant the return of the child to the home or to have future reunification services provided." Finally, the court noted that, during visitation, both parents' interactions with minor were not "as good as they should have been." The record thus reflects that the court both understood and properly exercised its discretion.

[4] Section 224.2, subdivision (a) codifies ICWA notice requirements: "(a) If the court, a social worker, or probation officer knows or has reason to know that an Indian child is involved, any notice sent in an Indian child custody proceeding under this code shall . . . comply with all of the following requirements: [¶] . . . [¶] (2) Notice to the tribe shall be to the tribal chairperson, unless the tribe has designated another agent for service. [¶] (3) Notice shall be sent to all tribes of which the child may be a member or eligible for membership, until the court makes a determination as to which tribe is the child's tribe in accordance with subdivision (d) of Section 224.1, after which notice need only be sent to the tribe determined to be the Indian child's tribe. . . ."

and death, and tribal affiliation (to wit, Bureau of Indian Affairs) for the maternal great-grandparents, despite the fact that the social worker had ongoing contact with the maternal grandmother in connection with the dependency of minor's siblings, such that she would have had additional identifying information (including the names and addresses of other maternal relatives). Parents thus reason: "Because the social worker had direct access to the parents and relatives, there could be no reasonable explanation for her failure to include any information about [minor's] linear ancestors. The record, therefore, illustrates that the social worker made no effort to obtain this identifying information to assist the tribes in making a knowledgeable decision about [minor's heritage]."

The agency counters that parents have forfeited the right to challenge the ICWA notices by failing to do so when filing their writ petitions in these proceedings, which included several related ICWA contentions. Specifically, as stated in our prior opinion: "On December 22, 2014, S.L. filed a parental notification of Indian status. The notice indicated that the minor is or may be a member of or eligible for membership in a federally recognized Indian tribe — the Cherokee — primarily, but not exclusively, through M.L. By March 11, 2015 the Cherokee Nation, the United Keetoowah Band of Cherokee Indians in Oklahoma, and the Eastern Band of Cherokee Nations had all responded that the minor was not an 'Indian Child' through their lineages.[fn. omitted.] Notwithstanding the unanimous responses from these tribes that the minor was not an 'Indian Child,' the juvenile court did not enter an order reflecting the non-applicability of ICWA." In a footnote, we then added that the record failed to indicate the juvenile court's protocol in determining which tribal bands to notify, but that, nonetheless, "petitioners do not argue that the notification process was in any way deficient; thus, we presume its adequacy." (*M.L. v. Superior Court*, *supra*, at p. 8, fn. 10 [A145269].)

Ultimately, however, while agreeing with parents that nothing in the record reflects a juvenile court finding that ICWA is inapplicable in this case, we concluded that the failure to make such finding was harmless error: "The responses from the tribes all indicated that ICWA is not applicable in this case and the tribes' responses were all

received before the May 19-20, 2015 six-month review hearing. The appropriate remedy upon a finding of a violation of ICWA's notice requirement would be to remand to the juvenile court for ICWA compliance. (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 188.) However, ICWA's purpose would not be served by a remand to the juvenile court as there is no evidence at all that the minor is an Indian [child]; thus, any error in failing to timely comply with ICWA's notice requirement was harmless on this record." (*M.L. v. Superior Court, supra*, at pp. 26-27 [A145269].)

Given this record, we agree with the agency that any challenge by parents to the adequacy of notice under ICWA has been forfeited. As our appellate courts have repeatedly recognized, the general forfeiture rule " 'that an appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order,' " applies " 'even when the issues raised involve important constitutional and statutory rights.' ([*In re Merenda P.* (1997) 56 Cal.App.4th 1143, 1151.])" (*In re Z.S.* (2015) 235 Cal.App.4th 754, 769-770.) "[T]o fall outside the [forfeiture] rule, defects must go beyond mere errors that might have been held reversible had they been properly and timely reviewed. To allow an exception for mere 'reversible error' of that sort would abrogate the review scheme [citation] and turn the question of [forfeiture] into a review on the merits." (*In re Janee J.* (1999) 74 Cal.App.4th 198, 209.)

Here, parents have failed to provide any legitimate grounds for disregarding this general forfeiture rule. To the contrary, the record from above reflects that they had every opportunity to raise the issue of the adequacy of the ICWA notice(s) when they raised other, related ICWA issues in the writ proceedings. As our appellate colleagues in Fifth Appellate District have aptly explained: "Of the many private and public concerns which collide in a dependency proceeding, time is among the most important. [Citation.] The action ' "must be concluded as rapidly as is consistent with fairness . . . ." ' [Citations] The state's interest in expedition and finality is 'strong.' [Citation.] The child's interest in securing a stable, 'normal' home 'support[s] the state's particular interest in finality.' [Citation.] To permit a parent to raise issues which go to the validity of a final earlier appealable order would directly undermine these dominant concerns of

finality and reasonable expedition." (*In re Merenda P., supra,* 56 Cal.App.4th at p. 1152 [internal footnote omitted].)

Thus, while parents may be correct that courts should be reluctant to find "parental inaction" has triggered the forfeiture of ICWA-related claims given ICWA's stated goal of "protecting the interests of Indian children and tribes" (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 251, 259-260), we must also recognize and give weight to the undeniably significant goals of providing dependent children with expediency and finality in our placement decisions. And, in this case, we conclude the latter goals trump the former one. Plaintiffs could have easily raised the issue of the adequacy of the ICWA notice(s) when raising the other ICWA-related issues in their writ petitions. But, alas, they did not. The time has thus come for us to turn our focus to minor's need for stability and permanency rather than parents' interest in continuing to work on their own problems in the hope of eventually securing her return. (See *In re Merenda P., supra,* 56 Cal.App.4th at p. 1150 ["an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order"].) By enforcing the forfeiture rule in this case under these circumstances, we may ensure that a reversal and remand on ICWA grounds will not cause the unnecessary repetition of proceedings which, at this point, have long passed.

DISPOSITION

The juvenile court orders are affirmed.

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Jenkins, J.

We concur:

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Pollak, Acting P. J.

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Siggins, J.

In re M.L., A147356